

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

IN THE MATTER AND THE CARE OF AND TREATMENT OF  
DARYL T. SNOW,

APPELLANT

APPELLATE CASE NO. 2015 - 000280

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Appeal from Georgetown County

Honorable Steven H. John, Circuit Court Judge

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Opinion No. 2017-UP-009

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PETITION FOR REHEARING

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**RECEIVED**  
JAN 26 2017  
SC Court of Appeals

Appellant Daryl T. Snow asks this Court to re-examine its opinion in this case and grant rehearing. Respectfully, the Court did not address appellant's argument that a diagnosis of "Other Specified Personality Disorder" is legally insufficient for commitment. The Court cites the standard of review in directed verdict cases and quotes the SVP statutory definitions, but provides no analysis of the complex legal issue presented by appellant's case.

The Court overlooked appellant's argument that the diagnosis given appellant does not comport with our Supreme Court's interpretation of the SVP Act and offends Due Process. In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013). In Thomas S., the Court stated, "The purpose

of the SVPA is to involuntarily commit only a **limited subclass** of dangerous persons and **not to broadly subject any dangerous person** to what may be an indefinite term of confinement.” *Id.* (quotations omitted) (emphasis added). As noted by the United States Supreme Court in Kansas v. Crane, 534 U.S. 407, 411-13 (2002), if a court cannot distinguish between dangerous sexual offenders who lack control and dangerous persons in general, Due Process prevents the use of civil commitment to indefinitely imprison citizens. The Court noted a study that found that “40% - 60% of the male prison population is diagnosable with antisocial personality disorder.” *Id.* *citing* Moran, The Epidemiology of Antisocial Personality Disorder, 37 *Social Psychiatry & Psychiatric Epidemiology* 231, 234 (1999). The Court further held that there “must be proof of serious difficulty in controlling behavior.” *Id.* at 413. Elaborating, the Court stated that the proof of lack of control

when viewed in light of such features of the case as the **nature of the psychiatric diagnosis, and the severity of the mental abnormality itself**, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment **from the dangerous but typical recidivist convicted in an ordinary criminal case.**

*Id.* (emphasis added). Appellant’s diagnosis of “Other,” which did not even rise to the level of antisocial personality disorder, is exactly the evil envisioned by the United States Supreme Court.

Respectfully, this Court overlooked the careful analysis of this issue by the New York Court of Appeals. State v. Donald DD, 24 N.Y.3d 174 (2014). Donald DD involved two appeals, one by Donald DD and another by Kenneth T. *Id.* at 177. Kenneth T. raped a seventeen-year-old girl in 1982, and attempted to rape a college student a year after he was released from prison in 2000. *Id.* at 177-78. At his commitment hearing under New York’s SVP law, the state’s psychologist testified Kenneth T. suffered from paraphilia not otherwise specified and antisocial

personality disorder. Id. at 178-79. The psychologist also testified that these disorders resulted in Kenneth T. having serious difficulty in controlling his conduct. Id.

In Donald DD.'s case, he had sex with a fourteen-year-old acquaintance when he was eighteen and then forced himself on her twelve-year-old cousin in 2002. Id. at 181. In 2004, after his release from prison, Donald DD. raped his wife's friend in a cemetery. Id. After his release, he violated probation and was then released again on parole when he molested his children and had forcible sex with his wife. Id. at 182. His parole was revoked and the state brought an SVP proceeding against him. Id. at 182-83. Two psychologists testified that Donald DD. had antisocial personality disorder. Id. Like appellant, Donald DD. was not diagnosed with any paraphilias. Id. at 183. Both psychologists testified that Donald DD.'s antisocial personality disorder gave him serious difficulty in controlling his sex-offending conduct. Id. at 183-84.

Concerning Kenneth T., the court described paraphilia not otherwise specified as "controversial" and a "catch-all" diagnosis. Id. at 186. The court held that the evidence was lacking that paraphilia not otherwise specified meant that Kenneth T. had "serious difficulty in controlling his conduct amounting to sex offenses." Id. at 187. The court particularly criticized the psychologist's conclusion that Kenneth T. could not control his behavior because he carried out his offenses in a way that allowed for identification. Id. at 187-88. After considering several examples illustrating why such a conclusion had no probative value, the court held that "such meager material as that a sex offender did not make efforts to avoid arrest and reincarceration" were not legally sufficient. Id. at 188. The court said the evidence of lack of control was "as consistent with a rapist who could control himself but, having strong urges and an impaired conscience, decides to force sex upon someone, as it is with a rapist who cannot control his urges." Id.

The court's holding with respect to Donald DD., who was diagnosed with only antisocial personality disorder, is even more applicable to this case. Citing Crane and other authorities for the point that the vast majority of all incarcerated offenders could be diagnosed with antisocial personality disorder, the court held:

**A diagnosis of [antisocial personality disorder] alone**—that is, when the [antisocial personality disorder] diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality—**simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.**

Id. at 190 (emphasis added). The court's analysis reveals that a diagnosis of antisocial personality disorder simply has so little probative value regarding inability to control the commission of sexual crimes that it was legally insufficient to form the basis for commitment. Id. at 190-92. Appellant urges this Court to revisit this case and adopt the New York Court of Appeals' reasoning in Donald DD.

Here, the State's case against appellant is even weaker than the evidence in Donald DD. Unlike in Donald DD., Dr. Gehle could not even give appellant a diagnosis of antisocial personality disorder. She was only able to give him the catch-all diagnosis disparaged in Donald DD. If antisocial personality disorder is by itself insufficient, then a diagnosis which—by the State's own expert's admission—is made only because she could not diagnose appellant with antisocial personality disorder, cannot suffice to commit appellant indefinitely.

Furthermore, the reasons used by Dr. Gehle are precisely the general conclusions that do nothing to distinguish appellant from the ordinary recidivist. Most of the factors cited by Dr. Gehle as supporting her opinion would be true of almost any incarcerated person:

- Used weapons

- Physically violent
- Lack of steady relationships
- Deals with his problems through violence
- Resistance to rules and supervision
- Negative social influences

R. 120, l. 15 – 121, l. 20. Almost any person convicted of a violent crime—sexual or nonsexual—will have these characteristics. Dr. Gehle also did not like appellant’s “attitude” during her two-hour interview with him:

Because he has these attitudes that are very pervasive, and they aren’t just applicable to that situation, it was the way he presented in the interview, his attitudes that he expressed, the way he blamed other people for his problems, the way that he didn’t take any responsibility for his behavior or took very, very limited responsibility for his behavior, the way he didn’t show or express, or I didn’t see any signs of remorse or empathy for others, those things are related to that diagnosis, to the symptoms of Anti-social Personality, you know, Anti-social Personality traits.

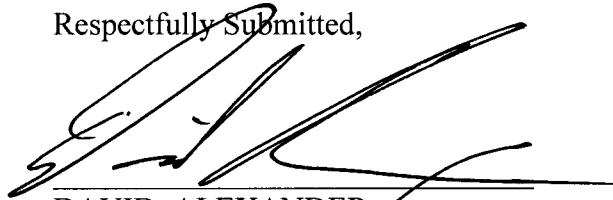
R. 139, ll. 11 – 22. Again, nothing in this analysis distinguishes appellant from any other recidivist.

Appellant received a fifteen-year sentence for the offense from which he was due to be released when these commitment proceedings were initiated. R. 250. Appellant has served this sentence. As Justice Kennedy wrote in Hendricks, “If the civil system is used to simply impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function.” Hendricks, 521 U.S. at 372 (Kennedy, J., concurring).

The trial court erred in not directing a verdict for appellant when the only evidence consisted of the catch-all diagnosis of “other,” did not demonstrate a lack of control regarding his sexual impulses and did nothing to distinguish appellant from any other recidivist. The State’s evidence that appellant falls into the latter category fails as a matter of law. This Court should grant

rehearing, reverse appellant's commitment and order his immediate release.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

DAVID ALEXANDER  
Appellate Defender

This 26th day of January, 2017.

South Carolina Commission on Indigent Defense  
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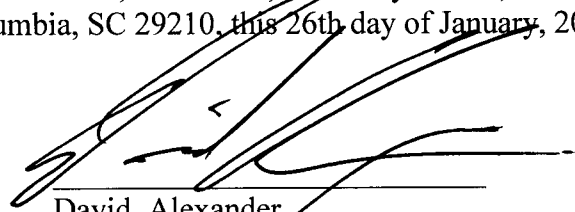
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Daryl Snow, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 26th day of January, 2017.



David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day  
of January, 2017.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.